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THE INTERNATIONAL STYLE IN POSTWAR LAW AND POLICY: JOHN JACKSON AND THE FIELD OF INTERNATIONAL ECONOMIC LAW*

David Kennedy**

I come to international economic law as an outsider, as an American public international lawyer interested in the constitutional structure of the international legal order. I come with all the fascinations and prejudices public law scholars bring to the traditions of international private law, commercial arbitration, international finance, trade. Nevertheless, my sense is that modern internationalists, both public and private, share a pragmatic sensibility or style, at once down to earth or case by case and technocratically sophisticated. I come to international economic law to explore this sensibility, its attitudes towards internationalization, its thoughts about politics and the role of international law.

At the same time, for all their similarities, the traditions and intellectual styles of public international law and international economic law remain estranged, caught in an elaborate pas-de-deux of public and private, metropolitan and cosmopolitan sensibilities. In this piece, I focus on the voice of one international economic law intellectual, Professor John Jackson of the University of Michigan Law School, as exemplified in his short 1989 treatise on international economic law, *The World Trading System: Law and Policy of International Economic Relations*. I

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** Professor of Law, Harvard University. I would like to thank Tony Anghie, Jose de Areilza, Nathaniel Berman, Robert Chu, David Chamy, Dan Danielsen, Ioannis Drossos, Karen Engle, Guenter Frankenberg, Jerry Frug, Duncan Kennedy, Annelise Riles, Joel Paul, Ileana Porras, and Chris Tennant for their comments on earlier drafts. I would like to thank the organizers and participants in conferences at which portions of this paper were presented: Professors Terry Kogan and Karen Engle and the University of Utah College of Law for the symposium on Violence and the Outlaw in March 1993; Professor Agostino Carrino and the University of Naples for the conference on Hans Kelsen in December 1993; and Professor Joel Paul and the American Society of International Law for the conference on International Economic Law in Washington in February 1994.

am interested in Jackson's relations with the discipline of public international law, and in the distinctive style of international policy science he develops—both its promise and its peril.

John Jackson's book on trade law¹ ranks with the best contemporary international policy scholarship, as the words on the cover indicate, at once an "introduction," a "treatise," and a "reference." A classic work in the field of international economic law by perhaps its leading North American academic practitioner, the book exemplifies the ideas and practices which make contemporary international economic law a distinctive genre. Fifty years after Kelsen's lectures, the book expresses the wisdom of the post-war international economic order, poised for the challenges of the next century.

A senior law professor at the University of Michigan, Jackson presides over the field of trade law in the United States. Indeed, it was Jackson who largely invented the field, transforming his experiences with the United States Trade Representative's office from a narrowing regulatory specialty into a recognized subject of legal study. In many ways, we can see Jackson's as a classic academic project—founding and developing a field or school. He began by getting trade law recognized as a significant field of study for American lawyers. In *The World Trading System*, he goes further, claiming, quite modestly and tentatively, to represent what he terms "international economic law."² Seen this way, it

1. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (1989).

2. Writing in 1948, Georg Schwarzenberger makes "the case for recognizing a special branch of law" addressing international economic relations. Georg Schwarzenberger, *The Provenance and Standards of International Economic Law*, 2 INT'L L.Q. 402, 405 (1948). In the familiar mode of a social science funding proposal, Schwarzenberger juxtaposes the bewildering array of world events with a scholarly inattention that demands remedy. Schwarzenberger opened his article with an announcement:

International economic relations are front page news. The Marshall Plan, devaluation of the French franc, Geneva and Havana Trade Conferences, Anglo-Russian trade relations, the Andes Trade and International Wheat Agreements, inter-Allied discussions on German currency, foreign assets in Austria, nationalization of British and American owned property in Eastern and South Eastern Europe and proposals for a Western Customs Union are but a few items selected at random. Each of these problems has its intricate legal aspects, and they all are within the province of public international law. It may not be inappropriate, therefore, to inquire whether the science and practice of international law are properly equipped to deal with this host of topical issues.

.....

The answer to this question can hardly be an unqualified affirma-

is not difficult to imagine his strategy, both institutionally and intellectually.

At the institutional level, he developed his teaching materials into a casebook³ and taught numerous students who would follow him into law teaching. He has participated in the conference scene for American law professors, presiding and speaking at numerous panels on trade law which place him between the world of trade practice and the academy. Although experienced in American government, he has been careful to distance himself from the positions of the United States Trade Representative, acting as a sort of pragmatic conscience for liberal trade, without becoming identified with any one issue or policy dispute.

Academically, his project faced a number of obstacles. When he began, none of the options available to students interested in the business or commercial side of international law—what might be called “private international law” outside the United States—could easily be imitated by trade law. There were advanced “international” offerings in recognized areas of domestic law, international tax being the most well developed. Trade was far too specialized a regulatory subject, however, to be routinely offered as part of the domestic law curriculum. Jackson’s main competitors were general courses in transnational law or international business transactions.⁴ Each represented itself as a broad subject, addressing structural and institutional issues beyond the details of particular

tive

Id. at 402. Schwarzenberger continued:

A glance at the textbooks of the inter-war period and at the syllabuses in international law of the law schools of the leading universities all over the world will indicate how the challenge was met. It is probably no exaggeration to say that it was done largely by ignoring the problem

. . . .

It would seem that the time has come for the establishment of separate branches of international law, supplementing treatises on, and teaching in, the general principles of international law. Such specialization will not only result in providing more adequate knowledge in the narrower fields, but is likely to enrich insight into the nature, functions and principles of the law of nations as such

Id. at 403–04.

Eighteen years later, Schwarzenberger would cover the same ground more comprehensively and more confidently. See Schwarzenberger, *supra*.

3. JOHN H. JACKSON & WILLIAM J. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT* (2d ed. 1986).

4. Cf. ALAN C. SWAN & JOHN F. MURPHY, *CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS* (1991) (international-business-transactions approach).

transactions and deals. There was a good deal of overlap, transnational law focusing slightly more on courts and regulatory conflicts, international business transactions more on international contracts, property, and business regulation. Both dealt primarily with American law, and both self-consciously straddled a number of domestic law fields bearing on international transactions. When Jackson began, an American law school with limited room in the curriculum for international "specialty" courses would almost certainly have offered (faculty resources being equal) any of these courses before international trade.

The achilles heel of the operation was limited attention to both foreign law and the public international law structure. Neither transnational law nor international business transactions gave much attention to international public law rules, other than those covering expropriation and various quixotic efforts to monitor multinational companies. Where treaties or executive agreements were relevant, both were more interested in the American reception of international rules than in their international generation or foreign applicability. All of these courses had begun as efforts to render the American legal curriculum less parochial, but each had drifted back to domestic law at the highest point of the American century under the pressure of student interest, the perceived influence of American law internationally, and the perceived poverty, even irrelevance, of the public international law and comparative law fields in the same years.

Jackson's success was to exploit these weaknesses without invoking either comparative law or public international law. Comparative law had marginalized itself by stressing either a deep foreign expertise incapable of being generalized, or a savvy knowledge of how business is conducted in a particular region unlikely to be seen as part of the basic curriculum. Public international law had reacted to the wide American perception of its irrelevance to the conduct of foreign policy by proliferating specializations (law of the sea, human rights, etc.) and becoming itself immersed in American public law by focusing on the foreign relations law of the United States.

In the GATT, Jackson had an international institutional apparatus and regulatory machinery which was relatively unknown, and which was linked to an American statutory regime. Public international law teachers generally avoided the economic institutions, except to comment on their constitutional structure or voting procedures, unless they were interested in development issues, in which case they would likely focus on the International Monetary Fund and the World Bank, rather than the GATT.

Jackson's academic achievement was to displace international business transactions and the tradition of transnationalism by capturing the intellectual energy and hope for international public law and the felt necessity of dealing with the "foreign" without losing the basic American legal materials and the national private law order. By focusing largely on the reciprocal interaction of national governmental and legislative institutions, he imagined an international "trade constitution" which brought international trade into the domestic public order to revitalize it as an international system.

At the same time, he recast clashes between national regimes not as political disputes awaiting international regulatory harmonization nor as deeply estranged cultural differences to be compared, but as an imperfect "interface" mechanism through which different legal cultures related to one another. He was consequently able to develop a broad theory of international economic relations from the details of trade law which would seem liberal, pluralistic, and internationalist by contrast to the tradition of transnationalism, while seeming pragmatic and realist about commercial matters when contrasted with public international law. In short, he made international trade a "regime" you could study, like the European Economic Community, as a working example of international regulation.

As a result, we can anticipate the distance travelled from the traditions of postwar public international law. The discipline of trade and economic law has displaced public international law, and management of economic relations has replaced the problems of peace and war. Traditionally, we read the move to international economic law as the displacement of one discipline by another—from public law to private law, from a concern with national sovereignty to an international order removed from sovereign forms, from law to policy, and from adjudication to administration, with economics replacing politics as law's sidekick and nemesis.

At the same time, however, we sense a move away from, or perhaps beyond, these sorts of distinctions. As this familiar story goes, international law was preoccupied with the distinctions between public and private, law and politics, diplomacy and trade, international and national. For contemporary international economic law, these distinctions have been relaxed, or set aside. The contemporary international policy scientist—however much he prefers the economic to the legal, the legal to the political, the private to the public, the international to the national, and so forth—is fully at ease with a relaxed and ad hoc mixture of all these elements. In this, the world of Jackson seems not simply a dif-

ferent or parallel discipline, but seems also more up to date and more sophisticated than that of his public international law predecessors.

I. PREFACE AND INTRODUCTION: THE NEW DISCIPLINE OF INTERNATIONAL ECONOMIC LAW

Above all, Jackson's book offers a succinct, readable description of the various elements which have come to comprise international economic law. Of the fourteen chapters (308 pages), only the introduction and conclusion seem at all theoretical or speculative (a total of thirty-six pages). Even here the voice is pragmatic, ushering us into an existing "trading system." Gone is the public international lawyer's elaborate speculation on the existence and nature of international law. The introduction is entitled "The Policies and Realities of International Economic Regulation."⁵

Jackson speaks directly of international law only in the penultimate section of this first chapter, after introducing liberal trade theory and the science of policy in international economic affairs which will be the main background and subject for the book. The section, labeled "International Law and International Economic Relations: An Introduction,"⁶ gives us some important clues about the relationship between Jackson's project and that of public international law. The section has three parts: "International Economic Law,"⁷ "International Law and Economic Relations,"⁸ and "Functional Approach to International Law."⁹ Jackson takes up international law just after introducing the term *international economic law* to name the discipline to be covered in his book, by way of contrast. He opens: "By way of introduction to the international law bearing on economic affairs, and as part of an historical introduction to it, several observations may be useful to the reader."¹⁰ International law will be history, background.

He introduces us to the basic "sources" of international law, treaties and custom, but notes that "[u]nfortunately, customary international law norms are very often ambiguous and controverted."¹¹ Indeed, often

5. JACKSON, *supra* note 1, at 1.

6. *Id.* at 21.

7. *Id.*

8. *Id.* at 22.

9. *Id.* at 23.

10. *Id.* at 22.

11. *Id.*

"scholars and practitioners disagree not only about their meaning but even about their existence."¹² As it turns out, in economic affairs,

there is very little in the way of *substantive* international law customary norms (that is, norms other than ones dealing with procedures for government-to-government relations, or of relations among firms or individuals in the few cases when international law is deemed to apply to firms or individuals).¹³

As a result, the reader can readily ignore the elaborate speculations of the international law field, concerning himself only with the relatively straightforward world of treaties.

Here, Jackson introduces his "functional approach."¹⁴ People, he tells us, particularly "the public," sometimes question the importance and effectiveness of international law, and Jackson acknowledges that this is not surprising, given how often these rules are violated.¹⁵ But, he suggests, this is less true when "reciprocity and a desire to depend on other nations' observance of rules" leads "nations to observe rules even when they don't want to."¹⁶ This seems particularly the case "in the context of economic behavior" where rules have important "operational functions," providing "predictability or stability" without which "trade or investment flows might be even more risky."¹⁷

Broadly speaking, these paragraphs offer an unexceptional introduction to the sorts of arguments international lawyers make for the efficacy of their discipline in the pragmatic age. For the international lawyer, the only surprising elements are Jackson's suggestion that there are few international law rules of relevance to economic affairs (dismissing the broad range of contemporary international law sources and procedures in favor of treaties), and his further suggestion that those which do exist are perhaps particularly likely to be followed for reasons of economic self-interest.

Public international lawyers have developed what they term a "functional" approach in ways precisely counter to Jackson's first suggestion. Rather than emphasizing the narrow range of substantive rules about which one might be skeptical, they have celebrated the importance of sources and procedural rules in establishing a regime of international

12. *Id.*

13. *Id.* at 23.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 24.

public order, even in the absence of agreement on particular substantive norms. It is to the project of elaborating substantive rules—whether extending the list of human rights or articulating more precise standards for air traffic safety—that international lawyers have been beckoned by polemics for two generations. Jackson seems simply to be setting this procedural regime and this project of international public order aside—to be replaced by a network of market relations for which only a few substantive rules will be necessary.

Jackson rather weakly defends the second proposition by reference to the traditional arguments for free trade which he has earlier introduced: "If such 'liberal trade' goals (for reasons discussed in section 1.2) contribute to world welfare, then it follows that rules which assist such goals should also contribute to world welfare."¹⁸ At this point, Jackson's argument goes off in two quite different directions.

If we follow his parentheses and return to section 1.2, we find a lengthy discussion of "liberal trade" policy and the theory of comparative advantage.¹⁹ Jackson is extremely modest about the conclusions which can be drawn from economic theory, even though he has warned us that "the basic economic propositions of international trade policy . . . will lie at the center of this exposition."²⁰ Although the "theory does have strong intuitive appeal,"²¹ Jackson is careful to summarize major criticisms and point out obvious weaknesses. Jackson notes that "[o]f course, this basic 'economic goal' is not the only goal of international trade policy,"²² an assertion he discusses in a subsection entitled "Competing Policy Goals and Noneconomic Objectives."²³

Liberal trade theory is defended only as a fact. Thus, for example, "regardless of their validity or intellectual persuasiveness, there is no question that [economic arguments for liberal trade] . . . have been influential. The basic 'liberal trade' philosophy is constantly reiterated by government and private persons, even in the context of a justification for departing from it!"²⁴ He continues: "[T]here can be little doubt of the general policy underpinnings of the post-World War II international economic system"²⁵ As a result, Jackson does not need, among

18. *Id.*

19. *See id.* at 8–17.

20. *Id.* at 6.

21. *Id.* at 13.

22. *Id.* at 9.

23. *See id.* at 17–21.

24. *Id.* at 8.

25. *Id.* at 9.

his qualifications, to introduce the reader to any conflicts or counter-arguments within economics; they have been netted out by consensus. Economic theory, now a possible justification for international law, is a matter of observation. He does not claim that economics tells us that some international law rules will be followed, only that some legal rules will be part of a liberal trade system.

Jackson is not a "law and economics" scholar in any traditional sense. He does not follow the entailments of specific arguments of economic theory for particular rules, nor assess aspects of legal culture in economic terms. Economics plays a much more general role in the text. Jackson deploys economic theory much as public international lawyers deploy reflections about the way "nations behave,"²⁶ or anthropological notions about how societies develop—to establish a factual baseline, even if a mythical one, for his international regime and momentum for his policy proposals. He validates in a general way those rules and those aspects of the overall public international law system which seem, for whatever theoretical or fanciful reasons, necessary or desirable to promote trade and advance, in Jackson's definition of "liberal trade," "the goal to minimize the amount of interference of governments in trade flows that cross national borders."²⁷ Where international law is useful to that end, it too has become simply a matter of fact—clear, orderly, without significant internal contradiction or bias, a significant part of the policy context.

If we continue reading, rather than following the parentheses, we come to what seems a more direct discussion of the relevance of law, a rather confused meditation on the relationship between theory and practice suggested by Maitland's phrase "the 'seamless web' of the law."²⁸ Jackson reminds us that despite the importance of "coming face to face with the complexity and coarseness of reality with the aim of solving real problems there is always the risk of losing sight of the forest because one's gaze focuses on particular trees."²⁹ Anecdotes can be as misleading as theories. "Thus we see the dilemma of a book like this."³⁰

26. See, e.g., LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* (2d ed. 1979).

27. JACKSON, *supra* note 1, at 8.

28. *Id.* at 24 (quoting F.W. Maitland, *A Prologue to a History of English Law*, 14 *LAW Q. REV.* 13, 13 (1898)).

29. *Id.*

30. *Id.* at 25.

In response, Jackson will offer "a little of both."³¹ The book will be neither deductive nor inductive, but will "state issues or questions . . . without in all cases trying to formulate answers."³² The result is a number of "themes or problems," widely divergent in type, including "[t]he dilemma of rule versus discretion," the "'effectiveness' of the trade rules," the need to relate conflicting policy goals, some of which "have to do with the legal and constitutional structure of the 'system,'" and so forth.³³ The result of this direct theoretical excursion into the seamless web of the law is a dispersion of dilemmas in the face of which one can only be modest. Jackson concludes the introduction on a typical note: "Thus I have expressed a sort of 'consumer warning.' Don't expect too much of this book."³⁴

Jackson has differentiated his new discipline from public international law in two steps. First he treats those rules which seem, either actually or hypothetically, to serve a liberal trade system (i.e., those which either reduce barriers to trade or enhance security and predictability). Such rules should properly be a focus of study for the international economic lawyer. Jackson suggests no difficulty, at this level, in figuring out which rules those are. Where, on the other hand, there are difficulties and confusions, we have the enduring dilemmas of policy—dilemmas less to be solved than, in Jackson's terminology, managed. The rest of public international law—its system of procedural order, its theoretical arguments for itself, its polemics for personal commitment—has been set aside, promoted, or demoted. For the international economic system, this international law seems relevant only as introductory background, as history, or as theory.

Unlike the powerful argument for international law among nations made by public international lawyers, Jackson makes the argument for international economic law softly, less rejecting international law and setting up a parallel discipline, a preferable optic, than describing international law's general displacement and restricted arena of continued relevance. Indeed, when Jackson speaks about these matters, he stresses the law's entanglement with economic policy. The book's preface opens this way: "Trade law and policy involves a remarkably intricate interplay of international law, national law, and nonlaw disciplines, including

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 26.

economics and political science.”³⁵

He introduces the new discipline of international economic law as something to which “one has heard references” in “recent years,” stressing that “[u]nfortunately, this phrase is not well defined,”³⁶ and has been used so vaguely that it might refer to “almost all international law.”³⁷ He suggests, but does not embrace, a “more restrained” definition, involving only those matters relevant to cross-border transactions.³⁸ In the end, he takes his cue from fact rather than theory: “In any event, the subject of international trade, whether in goods or in services (or both), is clearly at the core of international economic law.”³⁹ His book will build from the rules which concern this core.

The key points here are Jackson’s transformation of theoretical propositions into factual observations, his dismissal of international law’s classic concerns as matters of theory, and his correlative modesty about the alternative he advances. In one sense, this is simply the work of one realist displacing another. Jackson, like Kelsen, wants to move things from theoretical concerns to practical realities. Jackson’s greater informality, shorter theoretical prolegomena, etc., simply mark the progress from public international law. In another sense, however, Jackson has changed roads altogether, for now the driving image is not a public order of sovereigns, but a market of economic actors.

Jackson characterizes the introduction and the three chapters which follow as concerned with “the institutional and legal structure of the world trade system.”⁴⁰ The next seven chapters take up “the most important” of the “substantive regulatory policies of that system.”⁴¹ His final chapter offers “conclusions and perspectives.”⁴² Beyond the apparent logic of this division—a general policy framework followed by specific policies—the three structural chapters develop the theoretical argument sketched in the introduction, illustrating both the similarity of Jackson’s pragmatism as well as the differences he establishes between the old discipline of international law and the new international economic law. The later substantive chapters suggest the geographic and conceptual contours of the international economic law regime Jackson

35. *Id.* at ix.

36. *Id.* at 21.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 115.

41. *Id.*

42. *Id.* at 299–308.

presents.

II. THE INSTITUTIONAL CHAPTERS: PHASES IN THE DEVELOPMENT OF THE PRAGMATIST VOICE AND POLEMIC—NEW RELATIONS AMONG SOME FAMILIAR DISTINCTIONS

Like other modern pragmatists, Jackson is deeply skeptical, even rudely dismissive, of the traditional distinctions (international/national, economic/legal, law/politics) which might be thought necessary for "international economic law" to have an autonomous coherence. Like many, however, Jackson finds such distinctions easier to disparage than to eliminate.

The three chapters which follow the introduction, presenting the "institutional and legal structure" for trade, both dismiss and reinstantiate these distinctions. They are not, of course, organized directly to make a theoretical argument of this sort. Rather, their titles suggest a descriptive and logical general structure:

The International Institutions of Trade: The GATT⁴³

National Institutions⁴⁴

Rule Implementation and Dispute Resolution⁴⁵

Still, after reading the introduction, the reader might be forgiven for finding the list somewhat puzzling. For one thing, in the first chapter Jackson is adamant that "national" and "international" dimensions of the trade system neither could nor should be distinguished:

An even less fortunate distinction of subject matter is often made between international and domestic rules. This book will not indulge in that separation. In fact, domestic and international rules and legal institutions of economic affairs are inextricably intertwined. It is not possible to understand the real operation of either of these sets of rules in isolation from the other.⁴⁶

He adds that "[t]he tendency for academic subject matters to separate international from national or domestic issues becomes an important source of misunderstanding."⁴⁷

At the same time, the last of these chapters, concerning dispute reso-

43. *Id.* ch. 2.

44. *Id.* ch. 3.

45. *Id.* ch. 4.

46. *Id.* at 22.

47. *Id.* at 25-26.

lution and rule implementation, although surely general, is surprisingly legal in its focus. Indeed, the problem of "compliance" with international norms⁴⁸ and the importance of dispute resolution mechanisms in the process of rule implementation has become a central preoccupation of the public international law field. In a habit which follows the traditional interest in the establishment of an international court, dispute resolution and compliance are selected for special treatment in international law texts not because they are particularly germane or well developed in given substantive areas, but because, as primitive and decentralized judiciary substitutes, they seem to provide the most practical arena for investigating the efficacy of international law as a whole. By contrast, Jackson had introduced law almost apologetically in the introduction:

Thus the purpose of this book is to examine the theory and real implementation of the policies of international trade in our contemporary world in a way that attempts to explain how the theories have been effectively constrained by the processes of real human institutions, especially legal institutions. The perspective of this book is that of a legal scholar, of course. (My "comparative advantage" would not realistically support any other perspective.) Yet my goal—not too ambitious, I hope—is to explore the multidisciplinary context of trade-policy rules . . . I will state the basic economic propositions of international trade policy, and they will lie at the center of this exposition.⁴⁹

Given Jackson's insistence that problems of "policy," oriented around specific dilemmas or "themes" of practical relevance, are central to his conception of international economic law, it is surprising to find the traditional preoccupation of public law regime builders so central to his discussion of the "'constitutional structure' of the contemporary world trade system."⁵⁰ The deployment of dismissed distinctions is, of course, familiar in contemporary legal pragmatism. The difficulty is to determine precisely how and where, and with what strategy, the two attitudes are deployed.

Jackson's second chapter introduces the "international institutions of trade" by focusing on the GATT. It reads like a disquisition on what may and may not be considered either "law" or a "legal institution," even as the descriptive focus on the GATT makes law and questions about what might count as "legal" seem both theoretical and histori-

48. *See id.* at 7.

49. *Id.* at 6.

50. *Id.* at 7.

cal.⁵¹ The chapter responds, in a diffuse way, to an opening paradox: "Although the GATT is featured in headlines of major daily newspapers as the most important treaty governing international trade relations, the fact is that the GATT treaty *as such* has never come into force."⁵² We might dismiss this as the sort of professional trivia or historical detail that experts and insiders are supposed to know. Indeed, Jackson "must hasten to clarify, however, that the obligations of GATT are clearly binding under international law,"⁵³ but the "no-it-isn't/yes-it-is" theme continues throughout the chapter.

Indeed, we get almost no substantive information about the GATT in the chapter on the international trade system. That is postponed for later more particular chapters. This general treatment focuses on the broad framework which holds those substantive practices together, much like the typical public international treatise which begins with procedural matters, and then covers particular substantive topics as illustrations. At first glance, however, Jackson's general structure seems far less advanced, in part because he eschews discussion of international law's procedural elements as irrelevant to a system structured by a market rather than by inter-governmental accommodation. As a result, he seems preoccupied with the legality of the structure—precisely the issue modern international lawyers are most obsessive about forgetting.

Jackson tells us that the international trade regime is a complex edifice of institutions and treaties, of which the GATT is the most important.⁵⁴ Yet, he goes on, the GATT is not really an institution and not really a binding treaty, partly as a result of historical oversight and error. The GATT, Jackson maintains, had "flawed constitutional beginnings."⁵⁵ Still, Jackson continues, "any fair definition" would deem GATT an "international organization."⁵⁶ Although in theory "not an 'organization'" and therefore without "members,"⁵⁷ the GATT has contracting parties, and we can list nations which participate in GATT obligations.⁵⁸ These contracting parties can act jointly, often by majority vote.⁵⁹ Jackson concludes that it is actually better to think of the

51. *Id.* at 27.

52. *Id.*

53. *Id.*

54. *See id.* at 27–29.

55. *Id.* at 30.

56. *Id.* at 38.

57. *Id.* at 45.

58. *Id.* at 45–46.

59. *Id.* at 48.

GATT as an "elaborate group of committees, working parties, panels, and other bodies."⁶⁰

If we look at legal norms, Jackson maintains, the GATT's many and varied bilateral commitments and tariff concessions are the key legal obligations; beyond that there is simply a "code of conduct."⁶¹ This code of conduct, however, does have several key obligations. Of course, these vary a great deal in application⁶² and are often not complied with.⁶³ There is now also a great deal of bilateral breach brought about by the so-called "voluntary export restraints."⁶⁴ In any event, he continues, the official sphere of application of the GATT code is rather limited. It applies only to products and is binding only on governments.⁶⁵ It does, however, greatly influence other sectors and actors as well. Still, it is riddled with exceptions—grandfather clauses, waivers, balance-of-payments exceptions, and many more.⁶⁶ There are also many loopholes and sectoral exemptions for products, including agriculture and textiles.⁶⁷ The point, Jackson tells us, is that the GATT is "complex, constantly changing, and furnishes both pitfalls and opportunities for constructive diplomacy."⁶⁸

Like many public international lawyers, Jackson sets aside issues of law's specificity. He does so, however, neither in recognition of the reality of national behavior and the existence of a sophisticated procedural regime, nor out of any personal peace-orientation or optimistic desire to view the glass half-full. Jackson relaxes the sharp distinction between the legal and the nonlegal in his appreciation for the apparent maturity or flexibility of an international system not preoccupied with its own binding force. He does so because it seems that the existing international trade system, in this way the most sophisticated of international regimes, is itself a *mélange* of law and non-law, institutions and non-institutions—a scattered array of obligations and sites for bilateral or multilateral engagement. Thus, for example, in looking at the last completed round of GATT negotiations, Jackson concludes that the "overall impact of these results was to substantially broaden the scope of cover-

60. *See id.*

61. *See id.* at 41.

62. *Id.*

63. *See id.*

64. *See id.*

65. *Id.* at 42.

66. *See id.* at 42–43.

67. *Id.* at 44–45.

68. *Id.* at 30.

age of the GATT system" despite the fact that "[t]he legal status of these various agreements and understandings . . . is not always clear."⁶⁹

At other times, however, Jackson quite firmly defends law's specificity, often at precisely the moment he is most relaxed about the distinction between national and international. It is as if, for Jackson, the end of one distinction requires the reinstatement of the other. This relationship is most apparent in Jackson's notion of the world's increasing "interdependence,"⁷⁰ introduced as a factual observation at the very start of the book: "[T]he world has become increasingly interdependent."⁷¹ He notes that trade "constitutes over 50 percent of the gross national product of some countries," and is significant even for countries (like the United States) with large internal markets.⁷² Nevertheless, interdependence is not primarily a matter of statistics. It is rather a matter of interlocking political fears. "[G]overnment leaders, businessmen, and almost anyone else feels some anxiety about those mysterious foreign influences that can affect daily lives so dramatically."⁷³ Interdependence is significant because with it "has come vulnerability."⁷⁴

National economies do not stand alone: economic forces move rapidly across borders to influence other societies

. . . .
. . . Economic interdependence creates great difficulties for national governments. National political leaders find it harder to deliver programs to respond to needs of constituents. Businesses fail or flail in the face of greater uncertainties. Some laboring citizens cannot understand why it is harder to achieve the standard of living to which they aspire.⁷⁵

This interdependence has been achieved over the past forty years in part through the effort of international institutions, and in part through technological advances. It has created a world for international economics, whose task, "today . . . is largely a problem of 'managing' interdependence."⁷⁶ What is to be managed? The "host of new problems" brought about by the fact that "[w]hen economic transactions so easily cross national borders, tensions occur merely because of the differences

69. *Id.* at 55.

70. *Id.* at 2.

71. *Id.* at 3.

72. *Id.* at 2.

73. *Id.*

74. *Id.* at 3.

75. *Id.*

76. *Id.* at 4.

between economic institutions as well as cultures.”⁷⁷ Management, for the international economic law specialist, means addressing anxieties about the foreign and bridging cultural differences in a key distinctly different from that of national politics. Because of interdependence, national governments on their own simply become “frustrated” addressing these new problems.⁷⁸

Nevertheless, governments “respond” in many ways.⁷⁹ Some of these responses are legitimate policy options examined later in the book: “creat[ing] an international regulatory system,” and “develop[ing] internal policies designed to enable their nations to better cope with the challenges of the world economy” which Jackson terms “industrial policies.”⁸⁰ When responding in these ways, governments “confront international as well as national sets of rules, procedures, and principles”⁸¹—the very same rules that were called forth by the imperatives of an expanding international market’s need for security, predictability, and the like.

Sometimes, however, governments are tempted to disregard these rules or to interpret them cynically, exploiting the “ease with which detailed legal criteria can be overcome for political purposes.”⁸² This behavior typifies a

larger dilemma . . . today: the tension that is created when legal rules, designed to bring the subject a measure of predictability and stability, are juxtaposed with the intense human needs of government to make “exceptions” to solve short-term or ad hoc problems. This tension poses difficult problems for the practitioner and the scholar.⁸³

In short, when the issue is government’s political resistance to the interpenetration of national and international, scholars and practitioners stand with the rules. When the issue is residual attachment to the particularity of law, the practitioner/scholar stands with the international, where those sorts of distinctions no longer seem relevant.

Where Jackson’s consideration of international trade law and institutions is preoccupied with displacing law’s specificity, his treatment of national institutions in the following chapter is closely focused on the

77. *Id.*

78. *Id.* at 5.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 6.

83. *Id.*

relationship between international and national. In a sense, Jackson pursues the theme of his introduction, elaborating on the centrality of national institutions to the international trade system. He reasserts their importance⁸⁴ and introduces a number of significant national institutions, beginning with the United States presidency and Congress. Indeed, the chapter is significant in part because we can begin to see the outlines of the international trade regime's physical geography: Jackson devotes sixteen pages to the United States, three and one-half pages to the European Community, and one-half page to Japan.

More significant, however, is the role and nature of the national institutions Jackson outlines. The chapter opens with a short disquisition on the nature of sovereignty:

The erosion of the concept of sovereignty in international affairs has been much commented on. Perhaps in no context more than international economic affairs has this erosion actually occurred.⁸⁵

What Jackson describes is a matter of fact: sovereignty has been "eroded," itself an interesting physical metaphor. The point is at once familiar and puzzling. For a public international lawyer, such an observation might well be followed by an analysis of the importance of international norms and institutions, the history of their triumph, and a polemic for their development. This is precisely the sort of history Jackson gives us in introducing the erosion of law's specificity in the preceding chapter. Here, by contrast, Jackson uses sovereignty's erosion to introduce the importance of national institutions.

He dismisses the possibility that sovereignty might still be used to "argue against either international rules or foreign government demands for consultation or representation, on the basis that it 'interferes with our sovereignty,' or that it encroaches on the 'internal affairs' of a given government."⁸⁶ Given interdependence, this "is usually a misplaced argument in today's world."⁸⁷ At the same time, however, no "proposed course of international action" is possible except through the "le-

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84. *Id.* at 59 ("It is also clear today that any coordinated activity of governments, especially in connection with economic affairs, requires a complex set of individual governmental actions by both international and national institutions.").

85. *Id.* Interestingly, Jackson cites only Wolfgang Friedmann's, *The Changing Structure of International Law*—the 1964 high water mark of post-war liberalism in American public international law, and square in the tradition of Kelsen's *Holmes Lectures*—for this proposition.

86. JACKSON, *supra* note 1, at 6.

87. *Id.*

gal/constitutional/political constraints" imposed by national "procedures."⁸⁸ In Jackson's world, the international has become substantive: The national provides procedures for implementation.

The national works best as a mopping-up operation, attuned to the needs and rules of the international regime, and deploying its institutions in that context. But Jackson uses the section he labels "United States Law and the International System—Synergy or Conflict"⁸⁹ to make a broader point. It is not simply that, for example, "to achieve any meaningful initiative . . . the GATT requires not only action by some body of that organization, but also action by at least the United States and the European Community—and probably also by Japan, Canada and certain other key countries."⁹⁰

The erosion of sovereignty has also eliminated both the necessity and the possibility of dealing with the United States or the European Community as units in favor of a dispersed set of institutions and actors, both within and without the government.⁹¹ Indeed, the most significant lesson of Jackson's chapter on national institutions is not that the national should be put at the disposal of the international trade regime, but that a manager of the international trade regime, wherever he or she works, internationally or nationally, must harness a wide variety of international, domestic, and foreign entities to get anything done.⁹² Jackson goes on to present the significant institutional players and statutory regimes in the United States, the European Community, and Japan.

Between this and the preceding chapters, we can see two quite different roles for national actors: one, handmaiden to the trade regime (facilitator, translator, implementer); the other, an autonomous actor, resisting the international. The first role, leading to synergy, is preferable, not because it will promote free trade, but because it reflects a more accurate understanding of the facts of contemporary international life—interdependence brings with it a fragmented sovereign with many players, which the sophisticated policy manager will understand as numerous opportunities for engagement. This is a national unit to be welcomed into the international trade regime: indeed, we should insist upon

88. *Id.* at 60.

89. *Id.*

90. *Id.* at 59–60.

91. *Id.* at 77–78.

92. See, for example, Jackson's treatment of United States courts, executive, and Congress and the European Community's "departure" from theories of "strict sovereignty" in following up the implementation of the Tokyo Round agreements in the United States, *id.* at 197–99.

it, refusing theoretical separations of the national and international. The point of Jackson's meditation on sovereignty is to set the "facts" of interdependence against the assertion of national autonomy where it might threaten the international trade regime.

At the same time, there is another type of national behavior in which the nation fancies itself autonomous, unitary, and sovereign, and operates out of theory rather than practice. This outmoded role for the national—familiar from the introduction as the illegitimate attempt to swamp law with politics—relies on the sort of autonomy for national institutions, the sort of distinction between national and international, which Jackson will not "indulge."⁹³

Thus, in considering the implementation of international economic law, Jackson divides "opposition" to the effectiveness of international rules into two categories, both rooted in national governments. Some opposition "can be traced to . . . older concepts of national sovereignty,"⁹⁴ which translates, for Jackson, into illegitimate self-dealing by national leaders:

The chance to go "tooting off in private jets to negotiate with other national leaders at comfortable locations or three-star restaurants" is a key plum of otherwise dull government jobs, a high government ex-official once indicated.⁹⁵

But the "wise" national leader should also advocate breach of international economic law obligations when the rule is "bad policy" or "outdated" or "when reform of the rule is badly needed."⁹⁶ In short, when the national leader is the more appropriate agent for implementation of a sound international economic policy.

We can begin to see here the complex geography of Jackson's international economic law. It is not simply radiation out from the United States toward Europe and Japan, but involves activities on two conceptual levels pursuing incompatible logics: a trade regime, associated with the international and with law, but agnostic about their specificity; and a lower level, associated with national institutions and politics when these cannot be recruited into "synergy" with the international economic regime and insist on making old-fashioned arguments about "sovereignty." In the well-functioning trade regime, there is no particular role for clear-

93. *Id.* at 22.

94. *Id.* at 84.

95. *Id.*

96. *Id.* at 84-85.

ly legal or international institutions. In an interdependent world, a variety of social forms and institutions can, as a matter of fact, be used in managing commercial transactions. Law regains its specificity when necessary to counterbalance national sovereign recidivism, cabinining the tendency of governments to stray from the range of acceptable responses to the new interdependence.

For Jackson, an "interdependent" sovereignty involves a tension, presented as such, between the use or deployment of state institutions as an instance in international economic regulation or management, and removing the state as a political instance altogether. The tension could be resolved, of course, and conflict could give way to synergy, if those involved in the national systems would change their orientation from an outmoded political nationalism to a broad, more sophisticated management ethic. They should be moved to do so, Jackson suggests, for a familiar reason: that is the direction in which history is moving.

Jackson's chapter on dispute resolution, which follows the chapters on international and national institutions, takes up the effectiveness of the international economic law system in classic terms. Jackson quotes a lengthy passage "adapted from" two previous articles of his written in the metropolitan tradition of legal process and transnationalism.⁹⁷ We find again the opposition between a "'power-oriented' technique" and a "'rule-oriented' technique."⁹⁸ Every "observable" international system involves "some mixture of both,"⁹⁹ and both involve action by national as well as international actors, public as well as private negotiations. In the rule-oriented approach, however, all actors can participate democratically, having "their inputs" at various levels, and all can rely on "stability and predictability."¹⁰⁰ The power-oriented technique, by contrast, requires secrecy and executive discretion, hallmarks of a unitary and undemocratic sovereignty. In the power-oriented technique, players' "bargaining chips" are perceptions of relative authority rather than rule interpretations, and the stronger will be at an advantage. In the rule-oriented technique, raw power differentials are not crucial. Rather, they

97. *Id.* at 85-88 (adapting text from John H. Jackson, *Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE L. 93, 98-101 (1978) [hereinafter Jackson, *Crumbling Institutions*]; John H. Jackson, *Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT*, 13 J. WORLD TRADE L. 1, 3-4 (1979) [hereinafter Jackson, *Governmental Disputes*]).

98. *Id.* at 85.

99. *Id.* at 85-86.

100. *Id.* at 87-88 (quoting Jackson, *Crumbling Institutions*, *supra* note 97, at 98-101; Jackson, *Governmental Disputes*, *supra* note 97, at 3-4).

are tempered by good faith, and by the fairness of the rules themselves. The crucial point is again historical:

To a large degree, the history of civilization may be described as a gradual evolution from a power-oriented approach, in the state of nature, toward a rule-oriented approach

. . . [A] particularly strong argument exists for pursuing gradually and consistently the progress of international economic affairs toward a rule-oriented approach.¹⁰¹

This historical narrative, bracketed in lengthy quotations from earlier works, sits uneasily with Jackson's usual take-it-as-it-comes posture of management realism. This chapter ends "looking at the future" of dispute settlement and advocating work to improve the international dispute settlement system for economic matters.¹⁰² In this sense, the chapter is more aggressively situated in the development of the legal system than the book as a whole, and certainly more so than the conclusion. Here, Jackson advocates attention to the system, rather than resolution of any particular dispute: "[I]t must be recognized that in most cases it is *not* the resolution of the specific dispute under consideration which is more important. Rather, it is the efficient and just future functioning of the overall system which is the primary goal"¹⁰³

As a consequence of Jackson's redefinition of the national state's appropriate role, the system which Jackson promotes is no longer that of public international law. In one sense, the state remains the defining unit for international economic law, as it was for public international law. Indeed, the "more restrained" definition for international economic law Jackson proposes, involving transactions "that cross national borders" and the "establishment on national territory of economic activity of persons or firms originating from outside that territory,"¹⁰⁴ is obviously parasitical on the public international law scheme of territorial jurisdiction. Here, however, the point is not to relate governments peacefully to one another in a broader international public law regime, but to facilitate "flows" across their boundaries by eliminating national governmental interference.

The state's role is either passive, like a map, staying out of the way as economic activity flows about, or facilitative, enlisted in the imple-

101. *Id.* at 86-87 (adapting from Jackson, *Crumbling Institutions*, *supra* note 112, at 98-101; Jackson, *Governmental Disputes*, *supra* note 97, at 3-4).

102. *Id.* at 109.

103. *Id.* at 112.

104. *Id.* at 21.

mentation of international objectives. In this, international economic law, like public international law, insists on the obsolescence of sovereignty. Only here, the sovereign has not been embroidered in a broader politics, but has disintegrated into a broader economy. The international legal system to be developed is moving, not toward centralization, but toward fragmentation, as individuals at all levels become its agents in myriad proliferating contexts and institutions. Jackson notes the increasing "balkanization" of dispute resolution¹⁰⁵ and stresses the importance of bilateral or "minilateral" negotiations¹⁰⁶ and "citizen initiative."¹⁰⁷

The result is again a regime divided into two zones: one of international economic flows, and another of the underlying terrain of national politics. The upper zone is sophisticated, rational, and humane; the lower zone is murky, indulgent, physical, and frightening. In this, Jackson has reversed his initial anxieties about interdependence. We are no longer situated nationally, anxious about things foreign. We are now secure in the cosmopolitan world of international economic law, and uneasy only about the shady doings of an outmoded national politics.

It is a structure which Jackson naturalizes throughout the book with metaphor, exactly as many public international lawyers naturalized their policy proposal with the metaphor of an evolution from primitivism. Here, however, the image is spatial—a "landscape"—rather than temporal.¹⁰⁸ The conclusion vividly presents the international trade regime, not as an embryo about to be born, but as an anatomically detailed body in space:

What we have explored in the preceding chapters can be characterized as the "constitution" for international trade relations in the world today. It is a very complex mix of economic and governmental policies, political constraints, and above all (from my perspective) an intricate set of constraints imposed by a variety of "rules" or legal norms. It is these legal norms which provide the skeleton for the whole system. Attached to that skeleton are the softer tissues of policy and administrative discretion. Even the skeleton is not rigid or always successful in sustaining the weight placed upon it. Some of the "bones" bend and crack from time to time. And some of the tissues are unhealthy.¹⁰⁹

105. *Id.* at 52.

106. *Id.* at 110–11.

107. *Id.* at 103–14.

108. See, e.g., JACKSON, *supra* note 1, at 28 (describing "landscape of international economic institutions"); *id.* at 251 (referring to "landscape of national and international rules").

109. JACKSON, *supra* note 1, at 299.

The body is fragile, the prognosis uncertain. No one can say "for certain" that "worldwide economic disaster" can be avoided.¹¹⁰ Indeed, Jackson, like Kelsen, is adept at wrapping his polemics in apocalyptic invocations, such as "[o]ne can only hope that mistakes of the 1920s and 1930s can be avoided."¹¹¹ Jackson ends the book with the hope that the body will experience the "predictability and stability needed not only for solid economic progress, but also for the flexibility necessary to avoid floundering on the shoals of parochial special national interests."¹¹²

The metaphoric change suggests the difference between Jackson and public international lawyers like Hans Kelsen as polemicists. Kelsen's metaphor was temporal, naturalizing his advocacy of a new international regime as evolution, and the public international lawyer has, in many ways remained frozen in the becoming of that regime. Jackson's spatial metaphor welcomes the neophyte into the natural architecture of an existing regime. Jackson's objective is not to further progress toward a new regime, but to improve management of the "world trading system."

It is the "economic diplomats" who, in Jackson's final sentence, "we" hope will steer international economic law clear of the shoals of "parochial special national interests."¹¹³ In the only passage in the book addressing the reader as a "you," Jackson suggests who these economic diplomats might be. In the very first sentences of the book, Jackson presents "puzzles" which call for thought experiments: "Suppose you are the minister for trade of a small Asian country that is rapidly developing," and "[s]uppose you are advising a large multinational corporation based in the United States."¹¹⁴ The reader is not asked to play the role of an "economist" or "expert,"¹¹⁵ but of a policy maker outside the explicitly international institutional structure. Public international law texts are always asking us to imagine ourselves working for the State Department, the United Nations, or as citizens engaging in civil disobedience or working for non-governmental advocacy groups, struggling to build a new international society. Jackson has us working for companies, law firms, and governments, all representing clients with economic interests.

110. *Id.* at 308.

111. *Id.* at 187.

112. *Id.* at 308.

113. JACKSON, *supra* note 1, at 308.

114. *Id.* at 1.

115. *Cf. id.* at 2 (noting puzzle not solvable by any one academic discipline).

We can now begin to make out Jackson's own charge to the policy establishment: to beat their plowshares into résumés. Jackson's is a call to work rather than to public participation. It is a call to work not with a personal commitment to renewal of the international order, but with a day-to-day creativity in the exploitation of opportunities for wise action within the international trade system. Jackson addresses not a citizen intelligentsia concerned about peace, but students interested in careers in international economic law. In this sense, Jackson is an American professor of international law.

III. THE SUBSTANTIVE CHAPTERS: A COSMOPOLITAN ARCHITECTURE FOR INTERNATIONAL ECONOMIC LAW

The bulk of Jackson's book takes up the substantive structure of the international economic law regime. Four chapters consider the most significant regulatory principles governing the normal trade situation: tariff reduction, most-favored-nation status, non-discrimination, and permissible safeguards and adjustment mechanisms.¹¹⁶ Three chapters consider more abnormal or exceptional situations: national policies which might legitimately "compete" with a free trade orientation, and responses to "unfair" trading practices like dumping and subsidies.¹¹⁷ Two chapters take up "economies that do not well fit the roles of the world trading system": developing economies and state traders.¹¹⁸

In their overall pragmatism, these chapters confirm Jackson's public international law lineage. Jackson builds upon the elements of international policy pragmatism: a proliferation of contexts and players, an admixture of law and politics, a rejection of fetishism about sovereignty, a modesty about reform, an evolutionary progressive faith, a skepticism of grand theoretical claims or plans, a practical orientation, and a case-by-case approach. Bargaining occurs over the meaning or range of legal and political solutions, as well as over their content.¹¹⁹

We are far from formalism. All the key terms—"subsidy," "tariff," even "product," "industry," and "causation"—are presented as ambiguous.¹²⁰ Although meanings will be open to negotiation, even the basic

116. *Id.* chs. 5–8.

117. *Id.* chs. 9–11.

118. *Id.* chs. 12–13.

119. In discussing the myriad specific tariff "bindings" or "concessions" which make up the bulk of the GATT rule system, for example, Jackson stresses the bargained, potentially reciprocal, dimension of both political exceptions and legal commitments. *Id.* at 118–26.

120. See especially his discussion of GATT Article XIX, *id.* at 156, 159–60, intro-

bargaining concepts are ambiguous. We cannot be sure what a "reciprocal" deal might be, nor whether a nation has bargained for an "advantage."¹²¹ Indeed, people often call their actions "concessions" when these actions should be seen as having been to their advantage and vice versa. Even the basic policy arguments and legal interpretations, which might be helpful in sorting out whether a deal was reciprocal or whether an advantage was obtained, are insufficiently precise. Legal interpretations and policies inevitably conflict,¹²² and the policy scientist cannot say which interpretation is right.¹²³

Throughout the book, dozens of terms—some technical, others colloquial—are "placed" in quotations, not to ground the term in authority (Jackson is not quoting anyone in particular), but to signal his distance from any formal or essential approach to the language of international economic policy. Everything is a term of art, as if the modifier "so-called" were placed before every noun, Jackson sharing with the reader a sophisticated appreciation for the ambiguity of all terms of art. The only people who appear in the text as authorities to stabilize this interpretive ambiguity are unnamed policy managers—a "European diplomat" or a "senior GATT official" who provide aphorisms and anecdotes. The ground is a cosmopolitan present, peopled by roles. Jackson cabins the policy process only with a hope and an apocalyptic invocation should we lose our orientation.¹²⁴

Jackson's departure from the sensibility of public international law is as stark as the continuity of his pragmatism. He transforms the possibility, direction, and politics of public policy, both nationally and internationally. Jackson puts in question the entire notion of a peculiarly international order—indeed of a juridically structured order at all. Jackson fragments both the subjects and arena of international order, envisioning a shifting process of bargaining, at once legal and political. He reorients us away from the *level* at which the economic law regime operates and toward its substantive spirit and policy orientation.¹²⁵ From this vantage point, he offers the policy scientist a substantially narrowed vision of the possibilities for national public policy and a

ducing the idea of "variable" concepts.

121. See *id.* ch. 5.

122. *Id.* at 170–72.

123. *Id.* at 172.

124. See, e.g., *id.* at 187.

125. For a comparable deconstructive move in public international law see Philip Allott, *Power Sharing In The Law of the Sea*, 77 AM. J. INT'L L. 1, 5–6 (1983).

transformation of international public policy from the sphere of politics to that of technical expertise. The result is an international economic law regime with a completely different geography from that of earlier internationalist dreams.

We should take the elements of this dramatic reorientation, this move from metropolitan to cosmopolitan, one at a time. Jackson's broad rearrangement of both the players and the field of international order, to focus on spirit rather than structure, is evident in the general framework and role he gives to international economic law and in his chapter seven treatment of safeguards.¹²⁶ The consequent narrowing of national public policy is well-illustrated both by chapter seven and by chapter nine, which concerns national policies which "compete" with liberal trade objectives.¹²⁷ Chapters ten (on anti-dumping rules)¹²⁸ and eleven (on subsidies),¹²⁹ which together address what are often thought "unfair" trading practices, give a sense of the difficulties of mounting an international public policy to replace what has been lost at the national level.

Jackson presents the managed reduction of barriers to trade as the core problem of international economic law.¹³⁰ The book is concerned with an idealized world of governmental behavior in which the key actors are the policy makers of the national and international regimes. The basic activity is the levying of tariffs and their removal or reduction. Governments set tariffs, disrupting the flow of trade, and the international economic regime tries to reduce or eliminate the disruption through law, politics, bargaining, or adjudication, initiated either privately or publicly.

It is important to remember that this idealized structure of national regulation is all background to an idealized vision of normal trade among private traders. In this market foreground, presumptively private players are continuously bargaining and dealing, reaching out to one another across an abyss of uncertainty to engage in commercial transactions on the basis of a stable currency. In this book, Jackson tells us very little about the legal or political basis for this activity. There is nothing, for example, about the law of international commercial contracts.¹³¹ He does, however, tell us two crucial things. First, given the

126. JACKSON, *supra* note 1, at 149-88.

127. *Id.* at 203-16.

128. *Id.* at 217-48.

129. *Id.* at 249-74.

130. *Id.* at 149.

131. For a fuller treatment of these matters, see JACKSON & DAVEY, *supra* note 2,

number of practical departures and exceptions, the focus on the industrial trade in goods, imagined as an activity of private traders, may be as much the exception as the rule.¹³² Second, the international economic regime handles this problem by assimilating these exceptions as far as possible to the core image of an arm's-length private transaction through the use of analogy.

In this, international economic law facilitates the risk-taking behavior of private traders by modeling it: developing international rules about contracts and private property, and policies of privatization and currency stabilization to serve the imagined needs and interests of "normal" private traders. Where trade and traders are not "normal," the policy scientist can devise exceptional and temporary adjustment policies by analogy, treating the state trader's exports for dumping purposes, for example, on the basis of a constructed cost.¹³³

This basic approach is important because international economic law takes the same attitude, imagining all governmental activity as either a barrier or a spur to trade. The image of nations assessing and reducing tariffs is the basic conception. Other governmental activity is considered against this image and is taken up in the order of our relative ability to analogize a given activity to this structure. Thus, we move from tariffs to quantitative restrictions (which are elaborately demonstrated to be equivalent to tariffs), to subsidies, and then to other "nontariff barriers."

Jackson describes the landscape: "The receding waters of tariff and other overt protection inevitably uncover the rocks and shoals of nontariff barriers and other problems."¹³⁴ As it turns out, the range of governmental activities which can be analogized to the tariff, like the number of human social activities which can be reimagined as bargained exchanges among separate private actors, seems limited only by the imagination.

One consequence is that the stringency of the policy system, the intensity of the bargaining, the strength of the rules, and the overall clarity of the policy choices, relax as we move outward from the core of tariff reduction, just as the precision of the private trading system erodes as we move toward trade in services, bartered exchanges, transfer

ch. 2.

132. See *id.* at 139–40 (stating that industrial trade in goods accounts for only fraction of actual world trade; percentage would, of course, be even less if transfer priced trade within enterprises and bartered exchanges were considered).

133. JACKSON, *supra* note 1, at 221–22.

134. *Id.* at 4.

pricing, and government procurement. In the case of private contracts, we usually react to this erosion with some alarm, even moral indignation, and a call for the restructuring of what could seem corrupt insider deals into arm's-length transactions so as to narrow the gap between law and society. In the case of government regulation, however, we have an altogether different reaction. Particularly if we have a background in public international law, we might anticipate that as the analogy necessary to see national governmental activity as a barrier to trade becomes attenuated, the legitimacy of international intervention will fade. We will enter what a public international lawyer might call the zone of "exclusive domestic jurisdiction" or "sovereignty."

The interesting point is that Jackson reacts to this inevitable erosion of the model of tariffs as we might to the erosion of contract. We remember that for Jackson, arguments about "sovereignty" are no longer meaningful in an interdependent world. Consequently, as the analogy weakens, and as the international policy machinery becomes both more complex and less effective, governments are, Jackson asserts, more able to hide their parochialism, more likely to manipulate the rules, and more ingenious in their efforts to thwart free-trade objectives. As it becomes conceptually more difficult to see governmental action as a quantifiable barrier to trade, Jackson presents the national authorities as increasingly sneaky and cynical in pursuit of their parochial aims.¹³⁵ Actually, Jackson suggests, there is no limit to the ingenuity with which governments can invent ways to get around their basic obligations and reintroduce (in the form of non-tariff barriers)¹³⁶ barriers to trade previously eliminated by tariff concessions. It is like evading the income tax.¹³⁷

Were they upfront about it, governments would be as open to good-faith bargaining or reciprocal concessions in the area of non-tariff barriers as they are about tariffs. The process of international economic bargaining can deal easily with tariffs and relatively easily with quotas, but things become more difficult for subsidies and practically impossible for other non-tariff barriers. When it comes to non-tariff barriers, rather than trying to define a level of national governmental activity as off limits to the international regulator, Jackson focuses on the need for a

135. *Id.* at 129-31. It is no wonder that in the recent GATT round, negotiators have pressed the "principle" of "tariffication without exception" to force conversion of all trade restrictions into tariffs. Francis Williams, *Uruguay Deadline Seen as Last Chance*, FIN. TIMES, Sept. 30, 1993, at 8.

136. JACKSON, *supra* note 1, at 130.

137. *Id.*

change in spirit at the national level: the enlistment of national policy managers to the broader goals of liberal trade.¹³⁸

Ultimately, this change in spirit is far more important than a rearrangement of jurisdictions or the development of a particular international institutional apparatus. Indeed, Jackson is no knee-jerk supporter of either the international or the multilateral. In discussing the most-favored-nation obligation and "its politics," for example, Jackson describes a policy both legal and non-legal, to be carried out both multilaterally and bilaterally. Because the multilateral process seems to have gotten stuck, Jackson supports bilateral moves to stimulate trade—so long as the policy experts at the national level operate in the right spirit.¹³⁹

For Jackson, the goal is no longer rearranging sovereigns into an international legal order. Policy might be bilateral or multilateral, formulated by governments or private parties, internationally or nationally. The issue is the spirit with which policy is devised—whether it advances the project of international economic law.¹⁴⁰ This shift away from a coherent and progressively developing international regime of delineated competencies toward a more fluid network of shifting bargains, united only by an orientation toward liberal trade, defines Jackson's cosmopolitan vision most cleanly.

Throughout the book, Jackson gives short pragmatic sermons about the constant temptation, and, consequently, the enduring reality of official cynicism and manipulation, inevitably shading off into a parochial politics.¹⁴¹ His proposal is to bring these activities to light, placing all such temptations in a general process of mutual awareness and bargaining, in the hope that, like tariffs, they will be reduced by mutual concession. Given the strength of the temptations, and the meager and ambiguous conceptual framework for such a discussion, he is inevitably modest in his expectations. Indeed, we can really only hope that governments will take their cue from the international policy scientist and become more responsible. It is at this point that Jackson invokes a catastrophic image of autarchy and war to kick-start the reorientation of spirit he thinks necessary.

Transparency—the transformation of hidden governmental policies into

138. *Id.* at 123–26.

139. *See id.* at 145–48.

140. *Id.*

141. *See, e.g., id.* at 135 (discussing preferential systems in relation to most-favored-nation status); *id.* at 149–53 (identifying arguments for safeguards measures); *id.* at 165 (discussing Article 19 obligations).

quantifiable trade restraints which might then be the object of bargaining—creates what might be thought of as a market for policy. The danger, of course, is that this process of reinterpretation will be taken too far, disrupting even the settled norms of private law which facilitate commerce by seeing them as political choices. This danger is often thought of as the threat posed to national “culture” by international technocratic governance, a danger inherent in broad scale trade talks such as America’s Structural Impediments Initiative with Japan. Here, the cosmopolitan leaves us only with caution and recognition of the importance of differences in generating trade through comparative advantage. There can be no sure line between national regulation which should be foresworn, harmonized, or bargained, and the more apolitical background norms and cultural differences which are to be left intact, any more than there can be a clear line between public and private in a post-sovereign world. For Jackson, a reciprocal national vigilance about what seems foreign “unfairness,” moderated by awareness of the irreducibility of differences among national economic cultures, provides a sort of interface between necessarily different national regulatory systems.

This approach is apparent in his presentation of national “safeguards” and “adjustments.”¹⁴² It is perfectly legitimate for nations to help their societies adjust to an open-trade regime. As trade barriers fall, Article XIX of the GATT permits restrictions, and when justified, these are what we might term “industrial policy.”¹⁴³ Jackson warns, however, that these “economic adjustment” goals are almost always enmeshed in “practical politics.”¹⁴⁴ Indeed, the ambiguity of the concepts involved makes it practically impossible to tell where adjustment ends and protection begins and makes all legal and policy regimes attempting to demarcate legitimate and illegitimate safeguard activity complex and uncertain. In the end, Jackson suggests, there simply is no practical way either finally to prohibit or permit safeguards and adjustment policies at the national level.¹⁴⁵ It will be a matter of individual choice and orientation.

For Jackson, the way out is not to propose any single institutional or legal solution for which right-thinking policy managers will be recruited, but to place safeguard policies, in the broadest sense, among the decentralized bargaining chips in international economic negotiation, like

142. *See id.* at 149–57.

143. *Id.* at 151–58.

144. *Id.* at 149.

145. *Id.* at 184–87.

tariffs.¹⁴⁶ This avoids the pretense of a legal solution, but sets in motion a process that avoids excessively prolonged adjustments or protection masquerading as industrial policy. In the end, he asserts,

[i]t is difficult at this juncture to evaluate the potential for progress on safeguards discipline in the near future. Nevertheless, it does appear that the lack of substantial progress on this matter poses risks in an increasingly interdependent world. One can only hope that mistakes of the 1920s and 1930s can be avoided.¹⁴⁷

That the matter had been one of spirit rather than structure was evident in his introduction of the topic:

If there were no "liberal trade" policy or practice, we would not need to consider safeguards as such. It is only because international economic policies have emphasized reduction of border barriers to trade that the subject of safeguards, as an exception to the general rule of liberal-trade opportunities, comes into play.¹⁴⁸

It would be easy to miss the significance of this approach and to underestimate its difference from the contemporary public law pragmatism of the "international legal process" and "transnational" schools who inherited public international law's pragmatism. Like them, Jackson analogizes many different types of activities to pronouncements of the sovereign. Like them, he transforms an ambiguous set of policy and legal interpretive choices into an ongoing decentralized process of bargaining and mutual accommodation. Jackson's suggestion that national particularist activities come out as formally visible barriers to trade in a decentralized international bargaining process¹⁴⁹ resembles the efforts of public international lawyers to see any contact between people of different nationalities as the international public order at work. But Jackson does not drift toward national or private law. On the contrary, in his vision, the domestic policy manager has been reinvigorated by an internationalist spirit.

Unlike these public law scholars, however, Jackson does not present his bargaining process as a regime, nor his free-trade orientation as an international public policy choice to be implemented by an international policy apparatus, however decentralized. He does not accompany his criticism of national particularism with advocacy of a broader interna-

146. *Id.*

147. *Id.* at 187.

148. *Id.* at 149.

149. *Id.* at 149-53.

tional regime. He does not imagine that good international rules might reduce the conceptual difficulties obscuring the legal distinction between legitimate and illegitimate national action. In fact, his view is quite the opposite.

Jackson presents national policy either as already part of international economic law (because, as a matter of fact, it facilitates international economic activity) or as an unfortunate deviation. In Jackson's view, the choice is not between those areas of national public life which are part of "domestic jurisdiction" and those which have come to be regulated internationally, but between areas that do and do not support liberal trade. The public international mind searches for a way to understand this shift. It only seems possible within an invigorated monism, in which all of national policy has become subject to the international public policy of trade liberalization, enforced, however imperfectly, by the GATT and the primitively decentralized institutions of the international public regime. Again, nothing could be further from Jackson's conception. International policy is simply absent from his system, other than as the working out of reciprocal self-restraint.

This approach to national public policy is most evident in chapter nine, which explicitly considers national policies which "compete" with liberal trade objectives.¹⁵⁰ Jackson identifies two "threads" that run through the chapter: "the existence of important policies competing with those of comparative advantage and liberal trade, and the desirability of protecting the value of tariff and other trade rules by plugging 'loopholes' and preventing the protectionist use of a variety of ingenious import restraints."¹⁵¹ The core opposition is familiar—national policies which promote liberal trade and the ingenious exploitation of so-called loopholes for parochial objectives. This chapter considers situations which depart from that general structure, "in which import-restraining activity is required by legitimate government goals."¹⁵²

These situations turn out to be few in number and hard to specify. The most obvious case is "national security," and Jackson quickly recognizes that "the competing policy of protecting a nation's continued existence is obviously more important than economic welfare or other potential benefits of comparative advantage."¹⁵³ It turns out, however, that

150. *Id.* at 201–16.

151. *Id.* at 203.

152. *Id.*

153. *Id.* It is interesting that the "benefits of comparative advantage," introduced quite modestly, appear here as a sizeable and concrete factual matter to be weighed

policy makers are often mistaken in developing national security policies. For example, "[i]n a world where some wars could be over in minutes, traditional notions of the need for production facilities are not always applicable."¹⁵⁴ Indeed, the aggressive pursuit of comparative advantage may itself maximize security. Import restrictions may blunt national research and technical proficiency, or encourage national defense industries to go soft in the absence of vigorous competition.

The main point, however, is that the GATT language allowing national security exceptions is so broad, self-judging, and ambiguous that it obviously can be abused. "It has even been claimed that maintenance of shoe production facilities qualify for the exception because an army must have shoes!"¹⁵⁵

This problem becomes even more grave when we come to the "general exceptions for health and welfare."¹⁵⁶ Jackson lists the exceptions of GATT Article XX,¹⁵⁷ and indicates that "[m]ost of these measures might be thought of as falling within the general 'police powers' or 'health and welfare powers' of a government."¹⁵⁸ Again the crucial point is that "[m]any of these exceptions are quite general; for example, 'public morals' or 'human health.' Obviously, clever argumentation could be used to justify practices which have as their secret goal preventing import competition."¹⁵⁹

Again, the difficulty is that it will be impossible to tell in any clear way where legitimate objectives shade off into the illegitimate. Jackson works through a number of examples which demonstrate that even apparently legitimate efforts to prevent pollution or promote worker safety can wreak havoc with the trade system.¹⁶⁰ From a logical point of view, he acknowledges, it is perfectly possible to argue that products produced under less stringent national labor, safety, pollution, or health

against national existence. *Id.*

154. *Id.* at 203-04.

155. *Id.* at 204.

156. *Id.* at 206-08.

157. *Id.* at 206. He lists public morals, protection of human, animal or plant life or health, gold or silver trade, customs enforcement, monopoly laws (antitrust), patents, trademarks, copyrights, preventing deceptive practices, banning products of prison labor, protecting national treasures, conserving natural resources, carrying out an approved commodity agreement, export restrictions to implement a price stabilization program. *Id.*

158. *Id.*

159. *Id.* at 207.

160. *Id.* at 208-10.

regulations ought not be imported. Consequently,

[i]t is an issue fraught with dangerous potential. If this principle were extended . . . it could be the basis of a rash of import restrictions, often defeating the basic goals of comparative advantage. Government regulations vary so greatly that the already difficult conceptual questions of the world's rules on subsidies would pale into insignificance beside the problems which the cost of regulation equalization would create.¹⁶¹

The solution is neither an international regime nor recognition of a sphere of domestic jurisdiction. Instead, Jackson urges us to move in two familiar directions. First, toward vigilance against the abusive deployment of these exceptions, and second, toward "'benign neglect' with the possibility that over time many of these problems will sort themselves out as the necessity of health and safety regulation becomes more apparent to more nations."¹⁶² As policy managers, we must preserve in the first instance our free-trade orientation, avoiding the temptation toward national parochialism. Rather than being recruited to build an international regime, we are left hoping that enlightenment will bring regulatory harmonization, eliminating the temptation to use these exceptions and the need for more aggressive international enforcement.

There remains one sort of national policy which should be vigorously pursued to prevent private parties from erecting barriers to trade commensurate with the governmental restrictions so laboriously dismantled: antitrust laws.¹⁶³ Jackson unleashes national governments not where their own existence is at stake, but where they might contribute to the effort to remove barriers to trade by focusing on the private barriers they seem most suited to police. The only proviso is that nations not use their antitrust policies to implement "buy domestic" attitudes. Even here, Jackson hesitates to advocate substituting an international for a national regime.¹⁶⁴ Voluntary codes may be as good as mandatory ones, and national enforcement better or worse than international enforcement. The crucial point is that trade barriers must be reduced.

The public international lawyer may have difficulty making sense of Jackson's approach. If a public international lawyer wanted to move the international system toward more liberal trade, he would seek to limit governmental actions which obstructed this goal. He would rely on the

161. *Id.* at 210.

162. *Id.*

163. *See id.* at 211-13.

164. *Id.* at 212-13.

decentralized mechanisms of the international regime, and enhance both the strength of that regime and its commitment to free trade, perhaps through new treaties, institutions, and court decisions. Indeed, it is tempting to understand the GATT system in just these terms.

By contrast, Jackson begins with the persuasiveness to policy makers of liberal trade arguments, and analyzes the policy dilemmas which result.¹⁶⁵ National governments are, and will be, oriented toward free trade. In public-international-law speak, they are already the primitive decentralized agents of an international free-trade public policy. Where they can do more, they should and will. When it comes to an international regime, Jackson counsels "benign neglect."¹⁶⁶ His concern is with the quite serious conceptual difficulties—the indeterminacies of rules and standards—one encounters in trying to legislate what is and what is not a barrier to trade or a legitimate national exception. Only vigilance toward devious motives at all levels can answer this threat.

In chapters ten and eleven, Jackson comes closest to considering the possibility of an international public policy which, from a public international lawyer's perspective, could guarantee limits on national trade policies or replace the prerogatives sacrificed by national sovereigns to free trade.¹⁶⁷ Both chapters take up the distinction in the liberal-trade regime between "fair" and "unfair" trade practices. Chapter ten considers national regimes' responses to "dumping" by foreign competitors.¹⁶⁸ Chapter eleven considers national export "subsidies."¹⁶⁹ These chapters illustrate two related approaches to what we might think of as international public policy.

Jackson begins by placing the terms "fair" and "unfair" quite firmly in quotation marks, stating that "[t]he distinction between fair and unfair trade has become increasingly blurred in recent years, partly because of some fundamental disagreement about what should be called unfair."¹⁷⁰ People use the terms in a variety of shifting and vague ways. More importantly, however, conflicts about the meaning of fairness reflect unbridgeable cultural differences: "Societies and their economic systems differ so dramatically that what seems unfair to members of one society

165. *Id.* at 203–13.

166. *Id.* at 210.

167. *See id.* at 217–74.

168. *See id.* at 217–48.

169. *See id.* at 249–74.

170. *Id.* at 217.

may seem perfectly fair to those of another society."¹⁷¹

As public international lawyers, we are immediately drawn to the possibilities for international negotiation, consensus building, treaty drafting, adjudicating, harmonizing, carving out spheres of cultural difference to be respected, and realizing predictably stable international terms for trade. We might even expect Jackson, a well-known proponent of free trade, to begin such an international exercise by treating as unfair those policies which distort free trade. This, however, is not Jackson's approach.

Instead, Jackson warns us that "trading practices that . . . have been considered unfair because they interfere with or distort free-market-economy principles" are equally difficult to specify.¹⁷² The problem is the irreducible differences among economies.

[E]ven among the relatively similar western industrial-market economies, there are wide differences to do with the degree of government involvement in economy, in the forms of regulation or ownership of various industrial or other economic segments. As world economic interdependence has increased, it has become more difficult to manage relationships among various economies.¹⁷³

Even slight differences in "acceptance of basic free-market economy principles" can result in "situations that are considered unfair, even though these differences may not have resulted from any consciously unfair policies or practices."¹⁷⁴

When presented with the difficulty of interpreting liberal trade principles in national situations, Jackson responds with a call to vigilance against national tendencies to deviate, hiding their parochialism under manipulations of terms like "barrier to trade." When presented with the ambiguities of an international regulatory term like "fairness," Jackson responds by validating the diversity of national interpretations. Indeed, an international goal to achieve a "level playing field" might "imply that all governments must adopt uniform policies."¹⁷⁵ Even economic theory stands against such a result, as comparative economic advantage depends precisely on the continued existence of cultural differences. "Besides," Jackson asks, "isn't trade to some degree based on differences between

171. *Id.* at 218.

172. *Id.*

173. *Id.*

174. *Id.* at 219.

175. *Id.* at 218.

countries . . . ?"¹⁷⁶

For Jackson, the difficulty here is

analogous to the difficulties involved in trying to get two computers of different designs to work together. To do so, one needs an interface mechanism to mediate between the two computers. Likewise, in international economic relations, particularly in trade relations, some "interface mechanism" may be necessary to allow different economic systems to trade together harmoniously.¹⁷⁷

This "interface" concept is perhaps the book's most significant and original contribution. It reappears at several points and expresses extremely well a central theme of Jackson's approach to international public policy. The international regime, to the extent it must exist, should be quasi-mechanical and facilitative, focusing on communication and correspondence between systems rather than on the construction of a new international legal order or system. The best we can do is to make assumptions and approaches visible, and hope for their bargained amelioration as the liberal-trade spirit becomes more widespread.

Jackson illustrates this approach in his discussion of national anti-dumping regimes.¹⁷⁸ Jackson, like many other international economic law specialists, is quite skeptical of anti-dumping statutes. It is difficult, as an economic matter, to see what is wrong with discriminatory pricing, except perhaps in limited cases of predatory behavior. Even then, it appears a nation's consumers would have more to gain than its producers would have to lose. At best, it is difficult to measure dumping with any precision, and national administration of anti-dumping regimes, triggered by national producers' complaints, are likely to provide an ample wardrobe for dressing up protectionist measures in the rhetoric of fairness. At worst, anti-dumping can perpetuate "medieval notions of 'fair price.'"¹⁷⁹ As with national policies which might be exceptions to free trade, the case for anti-dumping legislation is clearest when it tracks antitrust concerns most closely, enforcing rather than disturbing the liberal trade system.¹⁸⁰

Nevertheless, for all this skepticism, Jackson advocates neither an international dumping regime restricted to antitrust concerns nor a mandated dismantling of national regimes.¹⁸¹ He describes ways in which a

176. *Id.*

177. *Id.*

178. *Id.* at 221-47.

179. *Id.* at 223.

180. *See id.* at 223-25.

181. Compare Jackson's follower Denton on this point. Ross Denton, (*Why*) *Should*

national anti-dumping system can be managed without using it as a means of disguised protection through, for example, stringent injury and causation requirements. Conceptual and legal tools are not available to mandate this, but vigilance by policy managers can help resist the temptation toward disguised protectionism.

Jackson concludes by proposing that we think of anti-dumping rules as an "interface" mechanism through which differing national conceptions of fairness will be brought visibly into relationship with one another.¹⁸² He suggests that the rules might be tested against the imperatives of trade liberalization and be the subject of a shifting negotiation process, which will be legal and political, national and international, private and governmental. Jackson writes:

Finally, it is both interesting and potentially provocative to suggest the possibility that for all its faults, the system of antidumping rules may be performing a useful function in world trade, *not* as a response to so-called unfairness, but rather as an "interface" or buffer mechanism to ameliorate difficulties . . . caused by interdependence among different economic systems. Could it be that the antidumping rules are acting as a crude or blunt instrument to cause different economic systems to more equitably share the burdens of adjusting to shifts of world trade flow? If so, perhaps we should view antidumping rules as part of the subject of "safeguards" (described in chapter 7) rather than as part of a subject of "unfair trade."¹⁸³

In this conception, the element of "unfairness," which might have been the key to an international regime, has been eliminated. In fact, "[s]ome of the 'unfairness' problems are in reality 'difference' problems."¹⁸⁴ Anti-dumping regimes are reconceptualized as decentralized mechanisms to facilitate trade liberalization. This happens either directly in cases of antitrust violation, or indirectly, through mechanisms rendering visible the protectionist sentiment that springs naturally from cultural differences. Such a protectionist sentiment might be reduced by policy managers bargaining in the spirit of free trade.

If we are to think of this as an international public policy regime, it is a very odd one indeed. There is no delimited role for the national state, nor for any structured international legal process. Rather, we have

Nations Utilize Antidumping Measures?, 11 MICH. J. INT'L L. 224, 265-71 (1989) (urging public interest analysis when enforcing anti-dumping laws).

182. JACKSON, *supra* note 1, at 244.

183. *Id.*

184. *Id.* at 26.

a naturally occurring adjustment process operated by agents of liberal trade sentiment throughout the existing institutional and legal system. The regime follows free trade—not promoting it, but assisting it, mopping up, and adjusting—less the idea of a regime than the regime of an idea.

Chapter eleven, concerning subsidies, presents a comparable image of the possibility of international public policy.¹⁸⁵ The visibility of subsidy policies and their root in government, rather than private initiative, makes this the most fruitful of various “unfair” trading practices around which to develop an international regime.

[B]y way of contrast with dumping matters, in the case of subsidies we are almost always talking about government action, rather than to individual enterprise action. Thus, issues of subsidies and countervailing duties are often significantly more visible and involve a higher level of government-to-government diplomacy than do many other trade policy matters.¹⁸⁶

It also seems an appropriate area for international regulation since the strongest economic argument for subsidy reduction is at the aggregate, international level, rather than from the perspective of importing nations, which might well benefit from a foreign export subsidy.¹⁸⁷

Nevertheless, Jackson does not advocate a public international law-style regime to address the distortions which subsidies might bring to liberal trade. He is critical of the existing international regime for attempting to do too much with normative concepts far too indeterminate to provide much guidance.¹⁸⁸ The existing system lacks even a definition of “subsidy,” and therefore allows national regimes to give free reign to their protectionist impulses in managing countervailing duty mechanisms.¹⁸⁹

Jackson repeatedly emphasizes the “controversy,” “perplexity,” “confusion,” and “ambiguity” which plague the subject. Are subsidies “unfair”? Do they damage anyone but the country which awards them? Should trading partners respond with outrage or with a thank-you note? Can subsidies be distinguished from all other national government activity? Is every government policy not likely to reward some producers and shift the costs of participating in trade? Can “export” subsidies be distin-

185. *See id.* at 249–73.

186. *Id.* at 250.

187. *Id.* at 252.

188. *Id.* at 255–61.

189. *See id.* at 257–58.

guished from "general" subsidies with any precision?

In fact, the international subsidies regime itself may be as dangerous as the practice of subsidization.

[I]t may be seen that the whole area of subsidies activity in international law, including the rules designed to constrain the use of subsidies and the other rules designed to allow national governments the unilateral privilege of responding to subsidies with countervailing duties, is not only extremely complex but holds the potential, if misapplied, of undermining the basic policy goals of the post-World War II liberal trade system.¹⁹⁰

The problem arises because "governments can use subsidies to evade a liberal trade system" while at the same time "the unilateral national government response of countervailing duties, can be implemented in such a way as to undermine liberal trade policies."¹⁹¹ In the context of national temptation to misuse controversial and ambivalent international rules, the prospects for an international regime are meager indeed.

The reader may now detect that there is great controversy about economic policies with respect to subsidies in international trade. It is not possible at this point in time, nor in this book, to resolve these issues. One thing is clear: for more than a century, the international trade rules, and some national systems, have been established on the basis of the proposition that imports which are subsidized by foreign governments are somehow "unfair."¹⁹²

Again Jackson builds from fact: subsidies are thought unfair, even if there is no good reason for thinking so or no clear way of ascertaining when. As a result, he proposes that international policy makers focus quite narrowly on an "actionable subsidy," which would make the most specific and trade distorting subsidies visible subjects of international debate.¹⁹³ He does not propose a new international regime, which could easily become the object of manipulation. Instead, he suggests "a series of principles that could be entertained by negotiators or national policy leaders in connection with the further elaboration of the international subsidy rules."¹⁹⁴ Rather than a regime, we get guidance in right-thinking. Each principle seems aimed at limiting attention to the most visible and formally identifiable subsidies, narrowing the ambit of attempted

190. *Id.* at 269.

191. *Id.*

192. *Id.* at 254.

193. *See id.* at 262-69.

194. *Id.* at 270.

policy initiatives both internationally and nationally which might backfire against the liberal-trade order.¹⁹⁵ For the rest, we return to benign neglect, relying on the advancing spirit of trade liberalization.

IV. A COSMOPOLITAN GEOGRAPHY: INTERNATIONAL ECONOMIC LAW AND THE WORLD TRADING SYSTEM

The trading system Jackson describes, the "trade constitution" of which he imaginatively projects, is universal in both aspiration and fact: a "world" trading system, to which the widest variety of economies and national regimes are assimilated. From a metropolitan point of view, Jackson's focus on the United States, the European Community, and Japan suggests a world radiating out from a center toward a periphery. For Jackson, it is far more significant that the trade constitution has room even for "economies that do not fit the rules of the world trading system," including both the less developed and those with nonmarket economies.

Jackson's international spirit is, in this sense, liberal and ecumenical. In considering "state trading and nonmarket economies," he observes that although "the post World War II international trading system is obviously based on rules and principles which more or less assume free market-oriented economies," it may well make sense to seek ways of "incorporating" non-market economies into this system.¹⁹⁶ Although Jackson acknowledges that "the assimilation of China into the GATT is a formidable task," he feels an "interface" mechanism might distinguish those aspects of the international regime which might be applied *prima facie* to non-market economies *as if* their trade was normal, and those situations which would need to be bargained into correspondence, by analogy, constructed costs, and so forth.¹⁹⁷

Jackson's political vision is equally open textured. Although he invokes the specter of a dark national parochialism to orient the vigilance of his new economic diplomats and managers, it is hard to identify a national partisan political program which cannot be accommodated by an appropriate "interface." Perhaps only secretive or duplicitous policies which do not make themselves available to reciprocal bargaining. But

195. For example, Jackson proposes "specificity," "cross border effects," "*per se* violations" to assist "administrability," and a *de minimis* cut-off rule. *Id.* at 270-71. All these would render the subsidy subject to scrutiny as similar in its identifiability to the tariff as possible. *Id.*

196. *Id.* at 283.

197. *Id.* at 291.

such policies, he seems sure, are likely in any event to be counterproductive and hard to sustain. Along with sovereignty, the new interdependence has eroded the possibility for a national regulatory state to pursue purely selfish policies without taking account of international pressures.

At the same time, "interdependence" does not inaugurate a new international political order. Jackson does not propose that an international regime legislate a liberal trade order. He finds the basic legal terms far too ambiguous to sustain a project of regime building. In any event, Jackson has left the public international lawyer's geography of international "planes" and national sovereign "spheres" behind in favor of a relentlessly fragmented order of conflicting sites and subjects for international bargaining and regulation. Public international lawyers typically concluded their polemics with a concrete proposal for action by concerned international policy scientists and politicians: build an international court, administration, and eventually legislature, which might then pursue an international politics of development, peace, redistribution, or regulation. In its place, Jackson leaves us only with participation in an already ongoing process of "management." "The problem of international economics today, then, is largely a problem of 'managing' interdependence."¹⁹⁸ The public international policy process has been replaced by decentralized adjustment and bargaining by managers and economic diplomats acting out of an invigorated liberal commercial spirit and vigilant against reassertions of national particularism.

In the final chapter, Jackson assesses the "trade constitution" of the GATT system. Although it "operates better than any one had reason to expect,"¹⁹⁹ he nevertheless acknowledges that it "clearly . . . is defective."²⁰⁰ He surveys at length the "weaknesses," "infirmities," and "gaps" in the system: there are too many loopholes, the legislative machinery is defective, much economic activity remains outside the GATT, procedures are confused, rule implementation is lax.²⁰¹ Rather than proposing construction of a new international regime which might ameliorate these faults, Jackson treats as a matter of fact the regime he has imagined as a constitution, and then focuses on ways to "manage interdependence" in this situation. He suggests that the manager will need to mix a number of "techniques," including those given prominent mention

198. *Id.* at 4.

199. *Id.* at 302.

200. *Id.* at 307.

201. *Id.* at 302-03.

in the book: harmonization, reciprocity, and interface.²⁰² The resolution of practical dilemmas concerning the appropriate mix of political and economic objectives, or the appropriate role for law and the distribution of power between courts and administrative officials, is left to the practice of economic diplomats and managers. These managers will mesh political, legal, and economic considerations, acting as both public and private officials both nationally and internationally.

For Jackson, traditional questions about the politics of international law are simply not easily answered. Jackson asks, for example, whether the "world trading rules are fair to developing countries."²⁰³ It turns out that the relevant rules are "remarkably vague and 'aspirational,'" and although a few discriminate on their face against developing countries, some seem to favor them.²⁰⁴ But Jackson does not dwell on the point, for "this subject has been extensively treated elsewhere and generally involves the expertise of economists rather than lawyers."²⁰⁵ He suggests that a "deeper" analysis might well reveal that the predominance of large powerful countries in the institutions of the world trading system puts developing countries at somewhat of a disadvantage,²⁰⁶ or might focus on the "question of debt."²⁰⁷ On the other hand, developing countries "are able to take advantage of either explicit or implicit exceptions in GATT so as to to [*sic*] pursue almost at will any form of trade policy they wish."²⁰⁸ In the end, Jackson leaves these questions "to works that are more focused on the economic considerations of world trade."²⁰⁹ International economic law begins where the policy responses to these difficulties leave off, treating their resolution, wise or unwise, as matters of fact.

An imaginary trade constitution, liberal trade ideas, national and international political judgments, a decentralized regime of bargained reciprocity: Jackson presents all these as *facts* rather than commitments. It is a strategic epistemology—the cosmopolitan's accrediting claim and aura of contact with reality are a matter of its internal narrative. As a result, that Jackson presents himself as a realist means more that he prefers a case-by-case approach or is sophisticated about the erosion of

202. *Id.* at 305.

203. *Id.* at 276.

204. *Id.* at 275.

205. *Id.*

206. *Id.* at 276.

207. *Id.*

208. *Id.* at 277.

209. *Id.* at 278.

sovereignty and avoids utopian schemes.

His realism, like that of the typical public international law scholar, is also a rhetorical device. Both display their awareness of the limits, ambiguities, and illusions of a legal and policy argument which relies on the traditional vocabulary of sovereignty. Both invoke a world of facts outside of law—in anthropology or economics or politics—which will operate as a check on law's illusions. Both place an interpretive project of responding to these facts center stage as a project of personal and professional commitment by members of their audience. For both, this is a largely technical project—deploying the “technique” of law or “managing” interdependence—which holds out a general political vision of peace or economic security as a distant promise and modest hope. It is here that we encounter the policy pragmatist as a polemicist, situated in a cultural dialogue with an audience—a law faculty, law students—that they might experience immersion in the technocratic as mobilization for a cause.

Beyond highlighting this common pragmatic or realist international style, reading Jackson focuses one on the ongoing development in the field of international legal commentary generated by a continuing duet between their quite different, if equally pragmatic, sensibilities. A main-spring of that development is the repeated deployment of this rhetorical realism as a criticism of each generation by its successors. The apparent renewal of this relationship to the real gives policy pragmatism a progressive sensibility, constantly working against past abstractions for future engagement. The result is a continually contested intellectual terrain, hurrying toward an internationalist ideal against a projected factual backdrop, generating—almost as a by-product—a technocratic regime of rejected sovereignties and political dreams.

The dialogue between the relative sensibilities of a public international lawyer and Jackson seems to address the difficulties of this international regime, its technocratic excesses and political weaknesses. The public international lawyer—hip and pragmatic—mobilizes governments to both multilateralism and internationalism. His expectations are modest, but the direction is sure. He sets himself against what he interprets as the cosmopolitan's defeatist attitude toward public order or ideological commitment to private ends and domestic laws. He will renew the international political order: there should be built a great ark for international policy, many cubits in all directions, and there should be assembled all forms of public life for embarkation.

Meanwhile, the cosmopolitan international economic lawyer reinvents the terms of policy debate, placing governments and companies in an

idealized and incessant process of market bargaining, developing a cosmopolitan élan at once vigilant against parochial politics and open to the widest range of policy choices. He understands the technocratic regime as a political process—at once liberal, ecumenical, and modest—and recruits managers who will use it in the right spirit. The cosmopolitan sets himself against the public international lawyer's idealism and nostalgic romance with international institutions and regulatory regimes.

When the public international lawyer explains the evolutionary urgency of his task, the cosmopolitan can only smile at his naivete. But when the international economic lawyer talks about the end of the regulatory state, the obsolescence of national regulation, and the new interdependence, the metropolitan looks up from his work and agrees. He knows this all already. That is why he is building an ark.